ATTACHMENT 37

Inside EPA Superfund Report
July 29, 1992

Inside EPA's Superfund Report

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An exclusive bi-weekly report tracking Superfund regulation, litigation, legislation and policies

Vol. VI No. 16 — July 29, 1992

Ruling could prove disastrous for municipalities

COURT SLAPS CITIES WITH LIABILITY FOR RESIDENTS', LOCAL BUSINESSES' TRASH

A federal district court dealt municipalities a severe blow last week, ruling that cities are liable under Superfund law for trash generated by residents and local businesses and transported to a landfill by a private waste hauler. The decision exposes several California cities to potentially crippling liability at the Operating Industries Superfund site, where cleanup costs are estimated at $600- to $800-million. The cities were targeted in third-party suits by industry PRPs at the site. The ruling is certain to fuel local governments' already vigorous fight for legislation to protect cities from Superfund liability, municipal sources say. Meanwhile Superfund officials met with House Energy & Commerce Committee staffers to discuss the agency's municipal liability policy. Stories on page 3.

WHITE HOUSE OVERSIGHT 4

White House workgroup reviews Superfund

A White House-led group charged with examining the Superfund program met for the first time July 21. The group is to submit to the administration by February 1993 a report detailing site cleanup projections over the next four years, the effectiveness of the current program, and its long term ability to meet projected demands.

CONGRESS 6

House Appropriations Committee cuts Superfund

The House Appropriations Committee has sliced Superfund by $200-million, leaving the program with the lowest funding level in four years. In other appropriations, the House revived the military base closure account appropriating $162.7-million for round II closing bases and has recommended the transfer of $69-million from the Environmental Restoration Defense Account.

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DOD, EPA agree on ways to speed cleanup of bases

The Defense Department, U.S. EPA, and Cal/EPA have hammered out a series of agreements aimed at speeding the cleanup of 17 closing military bases in California. The agreements are intended as models for base cleanups nationwide.

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Superfund office to issue interim guidance on risk

Superfund officials are in the early stages of developing interim guidance on risk assessment, which will address issues such as central tendency exposure levels and exposure parameters and values.

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U.S. disputes state's appeal in Rocky Mt Arsenal case

The U.S. says an order by state officials requiring the U.S. Army to clean up a part of a Colorado Superfund site directly challenges an ongoing remedial action and is therefore unenforceable. The U.S. is disputing an appeal by the state to the 10th Circuit, which says the order merely supplements the remedial action.

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U.S. sues seven companies over NJ site

The U.S. has sued seven companies for the cleanup of a New Jersey Superfund site where the companies allege the government is responsible for most of the contamination. And a federal district court has denied coverage to a company ruling that contamination from the company's disposal of waste over several years is exempted from coverage under the policies' pollution exclusions.

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Congressman backs residents at NH site

Rep. William Zeliff, Jr. (R-NH) has joined residents at a New Hampshire Superfund site in their fight to change Superfund law and EPA policy in order to dispel the Superfund stigma, which has led to residents' fears about liability and diminishing property values. While Zeliff has stressed that EPA use "flexibility" in its policies, the residents have emphasized sweeping changes in Superfund law. A newly-released report says EPA should consider cost-benefit analyses in cleanup decisions.

LENDER LIABILITY: The Michigan Attorney General's office in a last-minute move has informed EPA it will ask the District of Columbia Circuit to review the agency's lender liability rule, according to an EPA source. The AG's request comes just one day before the deadline to file challenges to the rule—July 28. A banking industry source says the suit, if filed, would "negate all the good work" of the rule. EPA in April issued a final lender liability rule to protect lenders from Superfund liability when they foreclose on a contaminated property.

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SUBSCRIPTIONS:
703-892-8500 or

Toll free 800-424-9068

NEWS OFFICE:
703-892-8546

FAX: 703-685-2606

Group Publications Manager: Rick Weber
Chief Editor: Robert Harrelson
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Associate Editors: Nancy E. Palus, Suzanne Yohannan
Documents Editor: Tom Reynolds; Documents Coordinator: Debra Creedon
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Contributing Editor: Darby Kernan

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'No city is safe,' warns municipal attorney

FEDERAL COURT FINDS CITIES LIABLE FOR RESIDENTS', LOCAL BUSINESSES' TRASH

In a severe setback for cities, a federal court ruled July 21 that municipalities are liable for trash generated by residents and local businesses and transported by private haulers to a dump that later ended up on the Superfund list. The long-awaited ruling is certain to fuel local governments' fight for legislation to protect cities from Superfund liability, municipal sources say.

The decision stems from industrial companies' third-party suits against local governments for the cleanup of the Operating Industries, Inc. landfill in Monterey Park, CA—one of the biggest landfill cleanups forcing the question of whether cities should be held liable for cleaning up dumps to which they sent municipal trash. The ruling exposes over 20 municipalities to potentially crippling liability, with cleanup costs at the OII site estimated at $600- to $800-million. Ten of the cities are close to finalizing a de minimis settlement with EPA, which would dismiss them from the third-party suit, according to attorneys close to the case.

The decision, in the U.S. District Court for the Central District of California, is "a major setback" for municipalities, according to an attorney for one of the cities named in the suit. The ruling comes 10 months after the same court ruled that a city that has contracted with a waste hauler to transport trash to a landfill is an arranger for disposal and potentially liable under Superfund law. The court at that time left open the question of whether cities "owned or possessed" the waste. At issue is whether cities are liable for all residential and commercial trash generated within their borders, or just trash generated at city government facilities such as city hall or the police department. Industry plaintiffs sought to attach liability to the municipalities based on section 107(a)(3) of the Comprehensive Environmental Response, Compensation & Liability Act (CERCLA), which imposes liability on "any person who [arranged for disposal or treatment] of hazardous substances owned or possessed by such person . . . ."

Following a July 9 trial, Judge William Byrne ruled from the bench July 21 that cities can be said to have owned or possessed trash generated by residents and local businesses. The cities will seek an interlocutory appeal, according to the municipal attorney.

A written opinion from Byrne is expected in the next several weeks.

The judge addressed several subsidiary issues, on one point finding that the cities may not use a de minimis party defense. The judge also said the cities did not have sovereign immunity, rejecting the cities' argument that in arranging for the transport of their citizens' waste they were performing a government function and therefore could not be sued.

There still is "a long road to go" before the industrial companies collect any money from municipalities, according to the municipal attorney. Had the ruling gone the other way, "that would have been the end of it," but now the companies can move ahead to the next phase of the trial, he says. Issues yet to be resolved include how much waste originated in each city, how much of the waste was taken to the Operating Industries dump, whether the trash contained hazardous substances, and ultimately for what share of cleanup costs cities may be held liable.

"This ruling fuels the fight for legislation" to protect cities from Superfund, says an attorney with American Communities for Cleanup Equity, a coalition lobbying Congress to pass a bill that would bar industrial Superfund polluters from bringing third-party suits against local governments. "No city is safe."

The latest ruling involves costs associated with a partial consent decree signed in 1989 by EPA and 64 companies named as potentially responsible parties at the site, under which the companies agreed to perform certain cleanup work and reimburse EPA and the state of California $61-million. The companies at the time expressly reserved the right to assert claims against other parties which were not signatories to the decree.

The 190-acre landfill opened in 1948, when it began receiving garbage from a number of surrounding cities. Operating Industries, Inc. has owned and operated the landfill since 1952. The site was closed and proposed for inclusion on the national priorities list and was finalized in 1986 (*Transportation Leasing Co., et al. v. The State of California (Caltrans) et al.*, U.S. District Court for the Central District of California, July 21, 1992).

DINGELL STAFFERS MEET WITH EPA TO DISCUSS MUNICIPAL LIABILITY

House Energy & Commerce Committee staff met July 22 with EPA Superfund chief Don Clay to discuss Superfund municipal liability. The meeting apparently was spurred by Senate passage earlier this month of a measure that would bar corporate polluters from suing cities for Superfund cleanup costs, a House source says.

Energy & Commerce had been wanting to meet with EPA to get an update on the agency's ongoing efforts toward a municipal liability policy, then the meeting "took on an added urgency" when the Senate passed a bill containing a modified version of Sen. Frank Lautenberg's (D-NJ) legislation to protect cities from Superfund liability, says the Public Works & Transportation Committee staffer, who is closely following the issue. The bill has been referred to the House, and Energy & Commerce Chairman John Dingell (D-MI) is expected to reject any measures amounting to piecemeal reforms to Superfund law (see *Superfund Report*, July 15, 1992, p. 10). House Energy & Commerce sources who attended the meeting did not return calls.

EPA told House staffers it is still reviewing its options for allocation guidelines for Superfund codisposal landfill sites, an EPA staffer says. The staffer characterized the meeting as a general briefing.

White House Oversight

WHITE HOUSE-LED GROUP EXAMINING SUPERFUND HOLDS FIRST MEETING

Representatives of EPA, and the Departments of Defense, Interior, and Energy met July 21 with administration officials to launch a review by a White House-led workgroup reviewing the Superfund program. The review is aimed at developing administration policy as Superfund reauthorization approaches.

The interagency workgroup has until February 1993 to provide the administration with a report on: site cleanup projections for the next four years, effectiveness of the current program in achieving timely and cost-effective cleanups, the long-term ability of the current program to meet projected demands, and recommendations on potential administrative and legislative changes aimed at improving Superfund implementation, according to a June 25 memo from the White House to agencies participating in the group (*text of the memo follows*).

The workgroup, as the "primary channel" for developing administration policy on Superfund, will focus in part on the efficiency of public and private sector Superfund expenditures and the breakdown of expenditures on cleanup versus transaction costs, according to the memo, which is signed by domestic policy adviser Clayton Yeutter.

The White House Policy Coordinating Group, which oversees domestic policy, established the interagency workgroup in mid-July (see *Superfund Report*, June 17, 1992, p. 3). Yeutter chairs the PCG. Heading the working group is Robert Grady, acting deputy director of the Office of Management & Budget.

The working group comprises Assistant Secretary-level representatives from the Office of the Vice President, the White House Counsel's Office, the Office of Management & Budget, EPA, the Departments of Justice, Interior, Defense, Commerce, and Energy, and the White House Office of Legislative Affairs and Council on Environmental Quality. Other agencies will be included as their participation is required, the memo says.

In a June 30 memo, the PCG asked each member agency to provide the name of a representative to the White House Office of Policy Development by July 6. "Working Group members should be at the Assistant Secretary-level or above and authorized to speak for their respective agencies," the memo says.

White House Memo on Interagency Workgroup

The White House
Washington

June 25, 1992

Memorandum for: The Vice President
The Secretary of Defense
The Attorney General
The Secretary of the Interior
The Secretary of Commerce
The Secretary of Energy
The Director, Office of Management and Budget
The Chief of Staff
The Administrator, Environmental Protection Agency
The Counsel to the President
The Chairman, Council of Economic Advisers
The Chairman, Council on Environmental Quality
The Assistant to the President for Legislative Affairs
The Assistant to the President for Economic and Domestic Policy

Subject: The creation of the working group on Superfund

Pursuant to the President's memorandum of February 24, 1992, establishing the Policy Coordinating Group (PCG), this memorandum creates the Working Group on Superfund. This working group will be the primary channel within the PCG process for developing Administration policy on Superfund and related legislative and administrative proposals.

The working group is charged with:

-- Reviewing and conducting studies as needed on the cost-effectiveness of existing Superfund legislative and administrative policies. Specific attention should be focused on analyzing: (1) the potential of the Act to protect environment and public health; (2) the efficiency of public and private sector expenditures; and (3) the breakdown of expenditures on site cleanup versus legal fees and other transaction costs;

-- Analyzing recommendations from outside experts on ways to improve the cost-effectiveness of the Superfund program; and

-- Developing administrative and legislative proposals for consideration by the PCG that would enhance the pace and cost-effectiveness of site cleanups and reduce overall transaction costs:

This working group will be chaired by the Associate Director (Natural Resources, Energy and Science), Office of Management and Budget. The members of the working group will include Assistant Secretary-level representation from the Office of the Vice President, the Office of Management and Budget, the Department of Justice, the Department of Interior, the Department of Defense, the Department of Energy, the Department of Commerce, the White House Counsel's Office, the Office of Legislative Affairs, the Environmental Protection Agency, and the Council on

Environmental Quality. Where issues require participation by other agencies, those agencies will be included.

The working group will submit a report by February 1993 presenting information on: (1) projection of the number of the site cleanups expected over the next four years; (2) the strengths and weaknesses of the current cleanup program in achieving cost-effective cleanups in a timely manner; (3) the long-range ability of the current program to meet projected demands; and (4) recommendations on potential administrative and legislative changes that would improve the operation of the program.

Clayton Yeutter
Chairman Pro Tempore
Policy Coordinating Group

Environmentalists fear review by pro-business group

QUAYLE COUNCIL MEETS WITH GROUP SEEKING TO SCRAP RETROACTIVE LIABILITY

The President's Council on Competitiveness recently lent an ear to a group seeking reforms to Superfund's stringent liability scheme, listening to what a council source called the group's "horror stories" about how liability has affected American businesses.

Representatives of the Superfund Action Coalition (SAC) told council staff during a meeting that Superfund is "fatally flawed," saying the law's retroactive liability provision wastes millions of dollars in transaction costs and threatens the economic survival of American businesses. The group wanted to air its views to the council, which is reviewing many aspects of the Superfund program, an SAC source says.

The council, headed by Vice President Dan Quayle, is part of an interagency workgroup to study Superfund recently formed by the White House office overseeing domestic policy (*see related story*). The council's review of the program sparks fear in environmentalists, who say they are concerned that its pro-business, anti-regulation bent will translate into less protective cleanups. "It makes me nervous," says an NRDC attorney of the council's role. "You can't believe they're meeting to find constructive ways to improve the Superfund program. You have to suspect [they're seeking ways] to make industry happy."

Representatives of SAC, a broad-based coalition including industrial companies, states and municipalities, insurance carriers, and lenders, met with council staff July 13.

"Superfund offends the idea of fairness," says John Lainson, a member of SAC who attended the meeting. His 106-year old business is facing liability at a Nebraska site. Between 1962 and 1964, the company sent about five 5-gallon buckets of waste containing traces of TCE to a city landfill, which was built according to regulations existing at the time, Lainson says. There should be a way EPA can achieve cleanups more quickly and conduct the program fairly, Lainson says. Citing the current recession and unemployment rate, he says "Jobs will not expand if the program continues the way it is. . . . Superfund is partially what's causing high unemployment in some states." Small towns in the midwest can fold up in no time, and do, he says. Many companies are being turned away from banks because they've received a notice letter from EPA referring to waste they legally disposed of decades ago, Lainson says.

Lainson told the council Superfund needs to be fixed legislatively. EPA is trying to do the right thing, Lainson said, adding that the problem is the law Congress passed. "It's the responsibility of Congress to get this thing changed." The main thrust of his comments to the council was that retroactive liability against companies whose disposal activities were legal at the time is not fair, he says, adding that he supports a retroactive liability scheme for illegal dumpers. "I have no interest at all in relieving anyone who dumps illegally—I don't care when it happened." But, he says, too many companies and cities are having to defend themselves against their own government for actions that were legal. Superfund is destroying people's confidence in their government, he says. Lainson says he does not understand why environmentalists, in their support of rigorous regulations to keep industrial polluters in check, back Superfund's liability standard. "It's ludicrous as far as I'm concerned," he says. "All the money is going to lawyers, not to cleanup."

Retroactive liability sticks industry with "limitless liability, with no checks and balances to ensure that [government] resources are being expended cost-effectively," according to William Bode, an attorney for SAC, who also attended the meeting. The council is looking for specific proposals for reforming Superfund, and SAC in the next few months will provide council staff with materials to support the coalition's position, Bode says. SAC does not support doing away with strict, joint and several liability—only the retroactive aspect. The group proposes a broad-based industrial excise tax to supplement Superfund dollars.

SAC specifically plans to provide the council with information on transaction costs, possibly including a survey of its member companies, according to another SAC source. "You absolutely need that information for the argument" against retroactive liability, she says.

"The assessment of liability for blameless industrial activity that occurred 20, 50, or even 100 years ago has mired down Superfund in massive litigation that drains resources that should be spent on cleanup," SAC says in its mission statement. The coalition holds that the root of the problem is the enabling legislation, not EPA, the statement says.

Some in industry concerned with council role

Industry sources are mixed on the idea of the Competitiveness Council reviewing Superfund. Many see it as positive,

saying council influence is bound to be good for industry. On the other hand, as one industry attorney sums it up, there are those who are "very concerned that anything the council touches will create martyrs" of industry. "That's a loser for us. We are willing to take on the issues on their merits," he says. The council's taking a hand in this—with their ideological rather than practical positions—stokes the flames among the environmental community in the belief that industry does not care about people or the environment, he says. They are "right-wing nuts" who think they're helping industry.

Congress

HOUSE APPROPRIATIONS COMMITTEE APPROVES $1.4-BILLION FOR SUPERFUND

The House Appropriations Committee July 23 approved $1.4-billion for the Superfund program for fiscal year 1993, down $200-million from the funding level maintained for the past three years. The Committee in marking up a bill by a House subcommittee capped administrative spending at $264-million, up $24-million from FY92 but $7.7-million less than the administration's FY93 budget request.

The bill will be taken up by the full Congress this week, according to a House Appropriations staffer.

The House Appropriations subcommittee on the Veterans Administration, the Department of Housing & Urban Development, and Independent Agencies, whose purview includes EPA, recommended $1.4-billion for Superfund in its spending bill June 25 (see *Superfund Report*, July 1, 1992, p. 5).

The Appropriations Committee is calling on EPA to review settlements with parties that have generated and transported municipal trash and sewage sludge, and report its findings by Jan. 1, 1993, according to a Committee report accompanying the bill. "The Committee is concerned that EPA has not reached settlements with [these parties], despite public statements more than a year ago that the Agency would address the municipal liability problem. Therefore, the Committee urges EPA to settle these cases expeditiously," the report says.

Within the recommended administrative expense ceiling, the Appropriations Committee provided an additional $4-million for site-specific Superfund-related travel. The bill further recommends $51-million for the Agency for Toxic Substances & Disease Registry.

Committee marks up FY93 defense bill

SENATE ARMED SERVICES INCREASES FUNDING FOR ENVIRONMENTAL CLEANUP

The Senate Armed Services Committee July 24 authorized increased environmental cleanup funding levels for the Department of Energy and Department of Defense during markup of the National Defense Authorization Act for fiscal year 1993. The committee authorized $1.5-billion for DOD environmental restoration activities while also increasing by $47-million funding for DOE's environmental cleanup programs.

The funding level for DOD environmental restoration activities is a $1.18-billion increase from the FY92 funding level, and the money will primarily be used for hazardous waste cleanup and other environmental restoration activities at military installations and other former properties. The Committee bill authorizes the full amount of the administration's request for DOD unlike a proposal by the administration which calls for $612-million of the total amount to come from sales of miltary stockpiles.

Included in the measure is language that directs the Defense Department to set up a program to consider indemnifying Superfund cleanup contractors on a case-by-case basis. The language does not require DOD to indemnify all contractors, according to a committee source. DOD will be looking at strict liability for contractors and at sharing risks in negligent cases; whether contractors will be using an innovative technology and possibly increasing their risk; and how long indemnification will last for a contractor. DOD is looking into a program that is "fair to contractors, that maintains quality work and doesn't become an open wound on the budget," a DOD source says.

The purpose of the measure is to ensure all contractors are given an equal opportunity to participate in cleaning up DOD Superfund sites, according to a source with the National Constructors Association, a contractors group. But the source points out the legislation is not "anything novel or new" and is "very broad and discretionary."

Also included in the bill is a provision which calls for DOD to establish a mechanism for the identification and early lease or sale of contaminated or uncontaminated portions of military bases scheduled for closure, according to a Senate source. This language is a result of two bills introduced in June by Sens. George Mitchell (D-ME) and William Cohen (R-ME).

Base closure account restored

HOUSE APPROPRIATIONS APPROVES $231-MILLION IN SUPPLEMENTAL FUNDS

The House Appropriations Committee July 22 revived the military base closure account which was left empty following the appropriations process last fall and in turn has slowed cleanup work at a number of military bases slated for closure.

The full committee agreed to a request by the administration of $162.7-million, which was sent with the president's fiscal year 1993 budget request, solely for environmental restoration at bases slated for closure under the Base Closure and Realignment Act Part II.

In addition, the committee recommends the transfer of $69-million from the Environmental Restoration Defense Account to the account for round II bases. This transfer was also included in the president's FY93 budget proposal. A committee source says the measure is expected to go to the floor for a full House vote sometime this week.

Last year congressional authorization committees earmarked $197-million for round II cleanups and pointed to the base closure account as the sole source of funding. However, in what some sources say was a disconnect between appropriations and authorizations committees, appropriators failed to fund that account. As a result, cleanup of the bases has been halted.

Currently the Defense Department, Cal/EPA and U.S. EPA are embroiled in a battle at Castle Air Force Base over the failure of DOD to meet milestones laid out in a cleanup agreement for the base. DOD charges that funds for cleanup are not available, while EPA officials question the department's efforts of obtaining alternate funds (*see related story*). Cal/EPA July 16 issued an endangerment order urging DOD to continue work at the base.

Currently there are 26 bases in 18 states slated for closure and if the measure is approved by both the House and the Senate cleanup could begin at many of the sites soon.

Fate of Rocky Mountain Arsenal bill uncertain

HOUSE PASSES WILDLIFE REFUGE BILL, SENATE ACTION UNCLEAR

The fate of a bill which would designate a portion of the Rocky Mountain Arsenal Superfund site as a wildlife refuge—passed by the House July 7—is still unclear, though an EPA source says the agency would like to work with the Senate to make minor modifications once the bill is referred to a specific committee.

Earlier this month the House passed H.R. 1435, which was introduced by Rep. Pat Schroeder (D-CO) in March. The final bill differs slightly from Schroeder's proposal and is the result of negotiations between the Armed Services, Merchant Marines & Fisheries and Energy & Commerce Committees.

According to an EPA source, the issue of trying to ensure that the creation of a wildlife refuge does not result in a lesser cleanup is one sticking point in the House bill. And although EPA has endorsed the bill, the agency in a statement of administrative policy says it will work with the Senate to "clarify EPA's responsibilities for cleanup certification and selection of response actions under the Comprehensive Environmental Response, Compensation & Liability Act (CERCLA)."

Most of the changes made to the original bill dealt with the Superfund process, according to one House source. The source says one of the key concerns in revising the bill was in ensuring that the Superfund remedy chosen for the site was not compromised by the fact that the property will ultimately be used as a wildlife refuge. The source says that some of the changes were just structural, for example what portion of the land is going to be transferred to the Department of Interior. Other changes dealt with what sort of cleanup action would be taken at the site and what the relationship is between the establishment of an arsenal and the Superfund process, the source says.

Under the House measure the U.S. Army would transfer roughly 815 acres to the Department of Interior for use as a wildlife refuge after the cleanup is complete. The bill provides "opportunities for environmental education, fish and wildlife-oriented recreation and scientific research."

EPA hopes to work with Senate staff to resolve two areas of concern in the House bill, according to an EPA source. A provision that calls for EPA "to certify that the response action required at the Arsenal and any action required under any other statute to remediate petroleum products or their derivatives" have been completed is a provision the agency needs to more fully understand, the source says. "Certifying that the remedial action has been taken is something the agency does all the time" but certifying that any and all actions under different statutes have been completed is another issue entirely, the source says. "There are many other statutes so it's important that we clearly define what is intended and what is anticipated" by this clause, he says. "Defining the scope of that work is something we would like to do with the Senate."

The second issue which the agency says needs further clarification, according to the EPA source, is the relationship between the creation of a wildlife refuge and a Superfund cleanup. "The bill clearly states that the creation of a refuge shall not restrict or lessen the cleanup but some at the [EPA] staff level question how the language is going to work in practice," the source says, "and whether or not this is a uniform concept. Does the fact that this property is a wildlife refuge mean that we have to place more emphasis on the habitat and does that change the mix of the cleanup remedy?"

A Senate source says the bill is expected to be referred to either the Environment & Public Works Committee or the Armed Services Committee. The source added that there are a few options for the Senate to move the bill, but that would be determined by the committee to which it is referred.

The Rocky Mountain Arsenal site is a 27-square mile site which is owned by the U.S. and operated by the Army. The site was listed on the national priorities list in 1987.

Contractor oversight

PRYOR INTRODUCES BILL TO FIGHT WASTE, FRAUD AND ABUSE IN CONTRACTS

As EPA strives to reform its oversight of contractors in the wake of repeated attacks by Congress, a recently introduced bill would codify some recommendations for tightening contractor oversight.

The government also would be prohibited from reimbursing contractors for entertainment and "employee morale" expenses. EPA's Alternative Remedial Contracting Strategy contractors have this year faced congressional charges of abusive spending hidden in indirect cost pools.

The bill, S. 2928, introduced by Sen. David Pryor (D-AR) revives legislation he sponsored several years ago. The new bill would designate certain activities as inherently governmental functions that are improper for contractors. The bill would also require federal agencies to compare the differences in costs between contracting out work and using government employees. Companies seeking government contracts would be required to receive certification that they are in compliance with the law from a Treasury Department licensing office that would be created by the legislation. In the process of being certified, contractors would have to provide information that could be used to check for conflicts of interest.

"It is not surprising to me that it is more costly to use expensive contractors to get the government's work done, but it is probably a surprise to agency officials," since they perform virtually no cost comparisons," Pryor added in his statement.

The legislation is intended to counter the waste, fraud, and abuse that is prevalent in government contracts, Pryor said, and it targets the $90-billion worth of service contracts contained in the fiscal year 1993 budget.

"We are contracting out today the basic responsibilities to run our federal government to an invisible bureaucracy," Pryor said July 1 before introducing the bill. He says contractors are performing basic agency missions such as management and budgeting, and that it costs 25 percent to 40 percent more to use these contractors than to use federal employees.

The legislation comes on the heels of repeated attacks on EPA contractors in Congress and government watchdog agencies and follows the announcement of an agency plan to overhaul its contract management (See *Superfund Report* July 15, 1992, p. 4). The Office of Management & Budget has also launched a workgroup to examine problems and to suggest improvements in civilian agency contracting. Pryor, who has scrutinized Defense and Energy department contracts, has directed his bill to address all federal agencies.

While OMB policy directives have in the past attempted to solve the problems, Pryor said none so far have worked. "I am convinced that OMB policy letters will not stop these abuses from occurring as they do not carry the force and effect of the law."

The bill has been referred to the Senate Government Operations Committee. A requirement for hearings has been waived because Pryor has held eight hearings on the subject since 1968, a congressional aide says.

In 1989, Pryor made a failed attempt to sweep similar legislation through the Senate on the Defense Appropriations bill. He blames the failure on successful lobbying by a contractors' trade association. If contractors' reaction to the proposal is any indication, the measure is sure to encounter similar opposition this time around.

Contractor association poised to oppose the measure

A source with the American Consulting Engineers Council — whose members include many EPA contractors — is already set to battle the measure, arguing that it would impose unreasonable paperwork burdens on small contractors applying for certification. The preference for federal employees over government contractors is foolhardy, this source says.

The kind of cost-comparison Pryor endorses is flawed and fails to consider government overhead, this source says, adding that performing cost-comparisons up front would be bad policy for engineering services, such as those commonly used at EPA. Procurement of these contracts generally considers costs last, selecting first the most qualified contractor, then accepting that contractor only if the contract can be negotiated at a "reasonable cost," the source says. This method of contracting is appropriate because the scope of engineering work is often difficult to quantify at the outset, the source says.

The Pryor proposal has failed in the past "because people know the value of the private sector" the source says, adding the bill would encourage the government to rely on work of its employees which is often inferior to contractor performance.

Superfund Revitalization

REGIONAL VISITS TO DETERMINE BEST WAYS TO SPEED SUPERFUND CLEANUPS

Superfund officials in an effort to gather ideas on speeding cleanups this month began a series of regional visits to determine which regions may have practices in the areas of enforcement, streamlining the process, and contracts management that could serve as models for Superfund cleanups nationwide. "What we are looking for is the best of the best" and then ways to communicate these ideas to the other regions, a Superfund official says.

The regional visits to be conducted by staff of the Superfund Revitalization Office (SRO) are expected to be completed by September according to the official and will culminate in a report to be distributed to all the regions. At press time a visit to Region III to kick off the initiative was scheduled for this week. EPA Administrator William Reilly last October charged the SRO with the responsibility for developing recommendations and taking action to speed the Superfund program.

A June 2 memo to the regions signed by national Superfund director Rich Guimond says the purpose of the visits are three-fold. The first objective is to determine the extent to which all regions share the concerns and problems outlined in a May report of regional perceptions of major difficulties faced by the Superfund program. According to the memo, the SRO also hopes to identify regional practices that can serve as models for addressing the problems that have been identified in the summary report and "which can be fleshed out during the planned visits." The third objective is to solicit five to 10 successful experiments or innovations which the region has implemented or developed and which the region believes would be of interest or value to other regions. Each regional visit will last no more than a day and a half and six members of the SRO staff will conduct simultaneous interview sessions with up to three regional employees at a time, the memo says.

According to one EPA source, the agency is also looking for projects that did not work as well in order to develop "a lessons-learned approach." The memo says the agency hopes to forewarn other regions about "projects that went awry."

The project is really an effort to inform the regions of the "best models" for Superfund cleanup that the agency currently has and ways in which they can be cloned, an agency source says. The agency chose the areas of enforcement, streamlining and contracts management because they were identified as "areas that need the most work," he says. The area of contracts management has recently been highly criticized so the agency is continually looking for ways to improve it, he says, and the enforcement process "can impair the acceleration of cleanup." The agency is also now trying to streamline the process in general to get the "greatest bang for the buck," the source says.

According to the memo, the agency's current plans are to assemble all "meritorious ideas obtained from the regional visits . . . into a written compendium of good ideas, best practices, and lessons learned." The agency will hold a series of meetings this fall to further disseminate the information, the memo says.

Changing Superfund

CONGRESSMAN SUPPORTS RESIDENTS WANTING TO AVOID NPL STIGMA

Rep. William Zeliff, Jr. (R-NH) is supporting residents living on a New Hampshire Superfund site in their pursuit to reform Superfund law to help alleviate their fears of falling property values because of liability obstacles. In a letter to EPA officials, Zeliff brought out two other points, calling for EPA to use some "administrative flexibility" with the residents who are concerned that the site's listing has created a stigma for the residential area.

Residents at the Holton Circle Superfund site, along with Zeliff are interested in getting the site delisted because the site harbors "no threat to public health and safety," an aide with Zeliff's office says. However, residents recently have begun requesting solutions that do not require the site's delisting (see *Superfund Report*, July 15, 1992, p. 24).

Residents are beginning to understand that "there was no way to have it delisted," an EPA source says. "Residents are willing to go step by step," the Zeliff aide says.

In a letter the aide gave to EPA at a public hearing July 21, Zeliff specifically backed two requests made by residents that would not require a change in existing Superfund law. A third issue raised in Zeliff's letter that addresses residents' liability fears will be taken up by the congressman's newly-formed Superfund task force, the aide says (See *Superfund Report*, May 6, 1992, p.36). The three issues draw from a letter signed by residents, which was submitted to both Zeliff and EPA (*see related story*).

Zeliff's letter to EPA, which resulted from a public meeting with residents, asks the agency to consider several measures: 1) change the site's name because it is named after a residential development and reinforces the Superfund stigma; 2) draw firm boundaries around the site so residential homes can be excluded from the site; and 3) protect financial institutions from Superfund liability claims, while also ensuring that residents who have not contributed to contamination of the land are free from liability.

The latter issue has already been addressed by an EPA policy that exempts homeowners from liability on property that sits on Superfund sites, an EPA source says. Currently, there is a bill pending in Congress that would exempt financial institutions from liability and would reinforce an EPA rule that frees lenders from liability. A state representative who is a Holton Circle resident says some residents have been unable to acquire equity loans. Another resident requesting a $5,000 college loan against collateral on a Holton Circle home valued at $200,000 was denied the loan, the state representative says.

In his letter, Zeliff says the site's name—Holton Circle—"carries a stigma that causes the residents undue hardship" because the site is named after a residential development. The residents believe the site's name should reflect the specific location of contamination or the name of the parties responsible for the contamination, which an EPA source says is usually how a name is chosen. However, at the time the site was listed, EPA did not know that information, the source says, leading the agency to name the site according to its geographic area. The exact source of contamination is still unknown, although it has been traced to a source in the Londonderry town garage area.

A change in the name of the Holton Circle site may be possible, one EPA source says. But the name must be descriptive of a site area, another source says. He says he is looking to see if the site can be renamed without undergoing another public comment period.

According to Zeliff's aide, residents say EPA is arbitrary in drawing boundaries at Superfund sites. The residents want the agency to define a boundary around the site, which would allow some homes to be excluded from the site. An EPA source contends boundaries are not strictly drawn for Superfund sites because Superfund law clearly does not call for distinct boundaries. A site is defined by where the contamination lies, the source says. A site also includes land where contaminated groundwater plumes extend and some non-contaminated areas, particularly where monitoring wells are set up, he says. "We study the area where we find contamination," he says, but adds that EPA "may be able exclude certain residential properties from the site."

"I'm not sure how much flexibility there is here," he says. The request stems from residents' concern with falling property values.

Residents have been opposed to the site's listing on the national priorities list because all of the residential wells meet safe drinking water standards. Natural attenuation, allowing contaminants to degrade through natural processes, was chosen as the site's remedy in June. Remediation by these means may take as long as 25 years. A public hearing was held July 21 to receive oral or written comment on the proposed remedy for the site. The public has until July 30 to submit any further written public comment on the proposed remedy.

EPA reimbursement to municipalities for tax abatements requested

RESIDENTS RECOMMEND UNIFORM CHANGES TO SUPERFUND

Residents living on a New Hampshire Superfund site have recommended reforms to Superfund law, as well as changes to EPA regulations and policies that have affected citizens at the site. The residents call for funding and site investigation reforms at the Holton Circle site, which if adopted by EPA could affect national cleanup efforts.

A letter, drafted by state representative Karen Hutchinson, outlines nine measures that she and residents want applied to EPA's handling of the Holton Circle site in Londonderry, NH. Thirty-three area residents signed the letter, which was given to EPA at a public hearing July 21 as part of public comment on an EPA remedy proposed for the site.

Rep. William Zeliff, Jr. (R-NH) is pursuing three issues raised by the letter, according to a source in Zeliff's office. Those issues call for a change in the site's name, firmer boundaries drawn around the site, and protection for homeowners and lenders from liability on Superfund land (*see related story*).

EPA will address each of the concerns raised in the letter in the agency's response to public comments, which will be included in a final record of decision (ROD), an EPA source says.

Under the recommendations, the residents call for EPA to reimburse a municipality for tax revenue lost when granting tax abatements to owners of property that lies on a Superfund site. The request would require a change in Superfund law, according to another EPA source. Hutchinson, who is also a resident on the site, says that currently, towns cannot afford to give tax abatements. Some homeowners living on the Holton Circle site requested the town of Londonderry to grant them tax abatements. The town denied the requests, causing some residents to appeal the decision to the state's board of tax and land appeals, a resident says. The case has yet to come before the board.

According to a source with the town's tax assessment office, the town issued a denial because it thought the state should determine how much the town should reduce the residents' property taxes. A Holton Circle resident says the town believed property values on Superfund land had become devalued because of a depressed economy rather than the site's listing on the national priorities list.

A source with the tax assessment office pointed out that three other Superfund sites in the town had not been granted property tax abatements.

Under other recommendations that address general Superfund regulations and policy, the residents want EPA to notify citizens living near a site before the agency starts investigating the land for listing on the national priorities list, Rep. Hutchinson says.

Residents also have requested that EPA's "informal public hearings" be renamed "formal public hearings" to emphasize the importance of the hearings. At a hearing, a public forum is held in which EPA officials receive oral and written comment on a proposed remedy. "Some real important ramifications" develop from the meetings, says Hutchinson. Once EPA responds to public comment, it finalizes a remedy, she adds. That process that finalizes the remedy has sparked another point maintained by the residents: to give residents "due process" by implementing a mechanism to appeal the ROD. An EPA source counters that the comment period provides residents with an opportunity for input.

Also in their recommendations, the residents say they believe the agency should not establish a time frame determining when a site will be deemed clean. When certain areas on the site meet cleanup standards, those portions should be deleted from the site's boundaries so that the size of the site continually changes, the state representative says. The site could be delisted when the last piece of property is termed contaminant-free, she adds.

The letter's last recommendation specifically addresses the Holton Circle site and its history. Residents are pushing for EPA to further investigate the U.S. Army's former use of land on the site. In the 1940s, an Army radio beacon facility was set up on the land. The town garage now sits on that area, which is believed to be where the contamination stems from, according to an EPA source.

Strategies aimed to improve and streamline cleanup decisions

REPORT RECOMMENDS COST VS. BENEFIT ANALYSIS FOR CLEANUPS

EPA should rely more heavily on cost-benefit analyses when developing cleanup strategies, specifically when evaluating treating versus containing waste, says a recently released report. The recommendation was one of six made in a report on ways to quicken EPA's cleanup decisions.

The report, titled *Striking a Better Balance: Improving Superfund Cleanup Decisions* and produced by Arthur D. Little, Inc., advises EPA on "improving key assumptions and criteria that drive cleanup decisions" and "streamlining and focusing the decision making process" for cleanups. Some of the report's recommendations are consistent with current Superfund law, while others would require changes in regulations or laws, according to the report. The recommendations focus on setting distinct risk levels for sites; basing cleanups on real risk; speeding up risk assessment by using "specific action levels"; implementing a more defined remedial planning process; considering benefit/cost evaluations; and adopting a formal framework for selecting remedies.

An EPA source says overall he reacted favorably to the report, adding that it has "some good recommendations." He

agrees with three of the six proposals because they are feasible and could be implemented without any changes in Superfund law. He says some of the proposals can currently be considered, and others may be brought up under reauthorization.

However, the EPA source says he does not agree with the cost/benefit evaluation proposal because it would require a change in Superfund law. "We're focusing on effectively trying to implement current law," he says. At a dialogue held by the Coalition on Superfund between EPA officials, environmental group representatives and other federal government officials, cost was the "biggest issue" discussed, according to a source with the coalition, which sponsored the report. "We think cost should be part of an evaluation, given costs are limited," the source says. The coalition fosters constructive and positive change to the existing Superfund program and often sponsors research through third parties, according to a coalition source.

According to the report, EPA needs to adopt a formal framework and use a scoring model to tally benefits and costs when developing remedial alternatives. A source with the Congressional Budget Office (CBO) says the report suggests that EPA should first establish a threshold test—one requiring health protection goals to be met—and then apply cost versus benefit measures. "I read the report as suggesting costs be explicitly weighed against cleanup benefits, excluding the benefit of meeting the required health protection goals," the CBO source says.

The report also recommends that EPA set distinct levels for allowable risk at Superfund sites, establishing "guidance values for acceptable, residual risk." It suggests assigning different allowable risk levels for land termed as residential and land to be used for industrial purposes. That recommendation would require EPA to change its policy of using "a fair amount of discretion" in deciding on allowable risk for each site and to start relying on a formula, the CBO source points out. An EPA source says he agrees with the proposal of setting distinct allowable risks, adding that it could probably be implemented through existing policy. EPA's current policy already considers future land use in its risk management decisions, the source says.

EPA should base its cleanup decisions on "imminence, likelihood, and controllability of risk," requiring PRPs to remain responsible for the cleanup if it is deferred or slowed, but later becomes imminent, says the report. According to a CBO source, the proposal "says you would have to be sure you could get financial commitment from the parties," but it does not offer details to explain how to secure that commitment.

One of the report's recommendations proposes that EPA quicken risk assessment by using specific "action levels" using numerical standards to simplify the assessment process. The report also says EPA should redesign the way it selects remedies by using a two-phase remedial planning process that emphasizes the need to establish cleanup objectives early in the Superfund process.

EPA, INDUSTRY, ENVIRONMENTALISTS SHARE VIEWS ON VOLUNTARY CLEANUPS

Industrial companies increasingly are urging EPA to establish a voluntary cleanup program under Superfund—a program which would allow companies to conduct cleanup work on their own, in accordance with EPA guidelines and with EPA assurances of freedom from future liability. Industry sources say the agency devotes few resources to overseeing voluntary cleanups at non-Superfund sites—even sites that pose high risk—because the agency's focus is on sites already on the national priorities list.

Given the government's limited resources, industry sources say, the nation would benefit from a program under which private parties could direct their own cleanups outside of the rubric of Superfund. The issue of voluntary cleanups was a primary focus of a June 24 public forum where EPA sought input on the Superfund program from various interested groups including industry, contractors, citizens groups and environmentalists. Even the White House has taken an interest in the issue, with the President's Council on Competitiveness floating proposals for how a voluntary cleanup program may work.

Following are comments on voluntary cleanups from various interested parties. An EPA enforcement official was asked to explain where the agency currently stands on the prospect of a voluntary cleanup program. Industry and environmentalist sources were asked how important it is that EPA incorporate PRP-directed cleanups into the Superfund scheme.

EPA's Elaine Stanley
Deputy director for Waste Programs Enforcement

EPA officials received a lot of input at the June 24 public meeting. The agency is trying to work out a way to fit voluntary cleanups into the Superfund scheme. It has received a number of proposals from companies—both conceptual general approaches and offers at specific sites. The agency is still in the mode of gathering information and input; it may try to have another public meeting to get more feedback on the issue. EPA remains concerned about some key issues, including whether it has the resources to set up a voluntary cleanup program and how such a program fits in to other Superfund priorities.

Bernie Reilly, attorney
E.I. duPont de Nemours & Co.

Companies' inability to perform cleanups voluntarily without the fear of future liability stands in the way of economic revitalization—this is an unintended downside of Superfund's strict liability scheme. Companies are reluctant to perform any cleanup activities without the blessing of the regulatory agencies. This reluctance is deterring investment. Deterred investment equals deterred jobs. A company is afraid even to test a site

where it suspects contamination, for fear the state or federal regulatory agency will jump in and impose a multi-million dollar cleanup that amounts to overkill. Industry needs EPA to say: If you do the following, your property will be perfectly acceptable as, say, an industrial facility. That is not the case now, and this is a barrier to investment and revitalization. We are leaving a lot of industrial property vacant.

Richard Robinson, attorney
Manufacturers' Alliance for Productivity and Innovation

It's very important that EPA have a voluntary cleanup program. If you're going to use the Superfund statute to get a regulated community to do something, you want to encourage them to do it. Making companies wait to get sued is the inefficient way to go about it. EPA needs to provide not only disincentives for companies for not cooperating, but also incentives for doing voluntary cleanups.

Michael Last, attorney
Mintz, Levin, Cohn, Ferris, Glovsky & Popeo, P.C.

Voluntary cleanups would be an extremely helpful element. They would expedite cleanups and we would see more cost-effective cleanups—I emphasize both the cost and the effectiveness aspects. There would have to be standards—guideposts for industry to follow, but not so cumbersome, so limiting, or creating so many hurdles as to defeat the purpose of voluntary cleanups. And EPA must address the concern many citizens have of adequate public participation. There would have to be a voice for the public so these voluntary cleanups are not perceived as sweetheart deals, being done in a hush. *On why EPA has not accommodated a voluntary program in Superfund to date:* The agency has been so overwhelmed with making the regulatory program work, only now does it have time to step back and look at areas in which the program may be overly cumbersome. While it would take an effort to step back and look at the world differently from how we have over the past eight to 10 years, it would pay off substantially.

Dr. Marshall Steinberg, Vice President
Health & Environment, Hercules, Inc.

A voluntary program of any sort is a good one. When companies can work with the regulatory agencies rather than have a solution dictated to them, a cleanup is more readily accepted. Any program should have some carrot, not all stick. If EPA really wants to achieve its Superfund goals, voluntary cleanups are an important step.

Doug Wolf, attorney
Natural Resources Defense Council

It is definitely an area worth exploring. Given the increasing pressures on EPA to get cleanups done better and faster, people in the environmental community are open to considering the merits of voluntary cleanups. The issue is how to avoid a scenario in which companies find all the loopholes, do the absolute minimum, and cut corners at every opportunity. This is still an open question—one the agency needs to address.

States & Superfund

U.S. LAYS OUT POSITION ON STATE'S APPEAL IN ROCKY MOUNTAIN ARSENAL CASE

A state order requiring the U.S. Army to clean up part of a Colorado Superfund site is a "direct and immediate challenge" to an ongoing remedial action and is therefore unenforceable, the U.S. government says, disputing the state's argument that its order does not challenge a Superfund action but merely "supplements" it.

The U.S. July 9 filed its brief in response to Colorado's appeal in *U.S. v. the State of Colorado*, a case posing key questions about state versus federal authority in the cleanup of Superfund federal facilities, and about the scope of the Superfund provision barring pre-enforcement judicial review of a cleanup plan.

States are closely watching the case in the U.S. Court of Appeals for the 10th Circuit, saying the outcome could have broad implications for their enforcement authority at Superfund sites. Depending on how the court rules, the case could result in severely hampering states' authority to enforce its own hazardous waste regulations, according to a state assistant attorney general whose state signed a friend-of-the-court brief in support of Colorado. Twenty-one states signed the May 4 brief.

Colorado is asking the 10th Circuit to review an August 1991 ruling by a lower court which denied the state's authority to enforce a compliance order at the Rocky Mountain Arsenal site near Denver. The district court said it lacked jurisdiction based on section 113(h) of Superfund law, which says that no federal court shall have jurisdiction to review a Superfund remedial or removal action selected by EPA. The court's interpretation of section 113(h) "leads to absurd and untenable results," the state argued in its brief to the 10th Circuit.

At issue is a portion of the site known as "Basin F," a 97.2-acre lined basin used from 1956 until 1982 for the disposal of liquid wastes. The basin was not included when the rest of the site was finalized for placement on the national priorities list in 1987; it was proposed for the NPL at that time and finalized in 1989. The state had pursued cleanup of the section under its hazardous waste laws, and contends that it should be allowed to enforce a state compliance order even though Basin F is now on the NPL.

Colorado in 1989 issued a Final Compliance Order mandating the U.S. Army—the site's operator—to close Basin F in accordance with the state waste cleanup program. (The federal Resource Conservation & Recovery Act enables a state to

administer its own hazardous waste program.) The U.S. filed suit to prevent the state from enforcing its FCO, arguing in part that Superfund law precluded the state's move. The state then filed for an injunction to enforce its order. The U.S. District Court in Colorado ruled that the placement of Basin F on the NPL triggered section 113(h).

The state argues in its May 4 brief that in attempting to enforce a state compliance order, it is not challenging the Superfund cleanup, but "simply attempting to supplement" it. Enforcement of the FCO "is an independent State action outside of the rubric of CERCLA 113(h)," the brief says.

The state argues further that the provision of Superfund barring pre-enforcement review applies to private polluters' actions but does not preclude "legitimate state enforcement actions." The court's interpretation of section 113(h) "would, taken to its logical conclusion, mean that a state is powerless to [block Superfund cleanup activities] even if citizens were gravely ill as a result of a polluting federal agency's bungled or poorly planned" cleanup, the state argues. And citing the amount of time cleanup may take at the Arsenal, more than 10 years, Colorado argues that Congress did not intend that operators of hazardous waste facilities "could simply cease compliance with state" regulations for long periods of time. And judicial review of Basin F after cleanup is completed would be of "limited, if any, significance to the state."

The state cites an earlier ruling, also in the U.S. District Court in Colorado, which held that Superfund law "requires the federal government to comply with the Solid Waste Disposal Act, and now RCRA, whether or not the facility is listed on the NPL" *Colorado v. U.S. Army*, U.S. District Court for the District of Colorado, No. 86-C-2524, Feb. 24, 1989). In that case, the court ruled that CERCLA does not preclude a state from enforcing its hazardous waste laws through RCRA. At the time of this decision, Basin F was not on the NPL. The state issued its final compliance order following the 1989 ruling.

U.S.'s arguments

Colorado's compliance order is "a direct and immediate challenge" to cleanup activities at Basin F, the U.S. counters in its July 9 brief. The Army currently is engaged in an interim response action it began in 1986. The "clear intent, effect, and purpose of the FCO is to supplant the CERCLA interim remedial action currently underway with response actions chosen by Colorado instead," the U.S. argues.

The U.S. disputes Colorado's distinction between challenges brought by private parties and those by state agencies. Superfund law "draws no distinction between private parties and governmental agencies," the U.S. says, adding that if Congress intended to exempt states from 113(h), "it could easily have so-stated."

The state's argument that owners or operators of facilities can "cease compliance" with state regulations ignores the fact that state laws are incorporated as applicable or relevant and appropriate requirements (ARARs) in EPA cleanups, the U.S. argues.

The state contends in its brief that Superfund's ARAR provisions give states "considerably less involvement" in site cleanups than states have under their independent RCRA authority. This contention should be resolved legislatively, the U.S. concludes. Such arguments are policy arguments, and a state's remedy lies with Congress, not the federal courts, the U.S. says.

The Rocky Mountain Arsenal is a 27-square mile site which is owned by the U.S. and operated by the Army. Constructed in 1942, the Arsenal was used for the manufacture and assembly of chemical warfare agents and incendiary munitions, as well as for detoxification and disposal of these products. Portions of the Arsenal have been leased to industrial companies for the manufacture of pesticides and herbicides. The Army built Basin F in 1956 for the disposal of contaminated liquid wastes.

EPA calls for no action at Vermont site

STATE TO PURSUE CLEANUP AGREEMENT WITH PRPs IN LIGHT OF EPA DECISION

State officials are negotiating with a group of suspected polluters toward a cleanup at a Vermont Superfund site EPA recently decided does not warrant remedial action under the federal Superfund program. EPA's recent "no-action" record of decision leaves unaddressed many of the state's concerns, therefore the state has launched its own negotiations with potentially responsible parties, according to a source with the Vermont Department of Environmental Conservation (DEC).

State officials understand the basis for EPA's decision, but are not satisfied with taking no action at the Darling Hill Dump site in Lyndon, VT, the DEC source says. In a June 23 letter to EPA, the DEC commissioner informed the agency that it could not concur with the agency's decision. The third Superfund record of decision (ROD) signed in Vermont to date, it is the first EPA cleanup plan the state has not concurred with, according to the DEC source.

EPA's no-action ROD was "not so much a disappointment as a surprise," he says, adding that the state "had gone into this assuming there would be a remedy." But there is a distinction between EPA's saying that no Superfund action is warranted and saying there is no environmental threat whatsoever potentially posed by the site, he said. EPA June 3(signed a ROD calling for no action at the site, saying it finds no evidence that contamination at the 3.5-acre dump poses a threat to public health or the environment.

"This is basically a solid waste mess," not a site appropriate for a Superfund cleanup, according to an EPA Region I official. Based on data from EPA's remedial investigation/feasibility study, risk at the site fell within an acceptable range, the official says. "While it's comforting" that the state is going to clean up the dump, which the official says is a steep pile of debris, the site is not within the scope of Superfund. The site was included on the national priorities list based on the discovery of low levels of trichloroethylene (TCE) in adjacent well fields, the official says.

The DEC will address three main concerns it has with the site: proper closure of the site, including capping the dump and managing leachate; long-term groundwater monitoring; and institutional controls such as deed restrictions.

EPA's no-action decision "comes after a thorough study of contamination . . . and consideration of public input," according to a statement from Region I Administrator Julie Belaga. EPA proposed its plan in March and accepted comments from the public from April 10 to May 9. Under EPA's plan, "no treatment or containment of disposal areas would occur and no effort would be made to restrict access to the site. However, this decision does not limit the ability of the state of Vermont to pursue action under its own authority," an EPA statement says.

Attorneys for PRPs at the site did not return phone calls.

The Darling Hill site began operation as a disposal area for municipal and industrial wastes from 1952 to 1972. From 1972 to 1989 Ray O. Parker and Sons, Inc. operated the site. EPA included the dump on the national priorities list in 1989.

Federal Facilities

DOD, EPA AGREE TO SPEED CLEANUP OF CALIFORNIA CLOSING BASES

The pace at which 17 military bases in California are cleaned may be significantly quickened with the announcement last week of a series of agreements between California EPA, U.S. EPA and the Department of Defense. The agreements lay the framework for speedy cleanups of closing bases which is hoped to be "transferred to other regions in the country," says one DOD source.

The agreements, although not yet in final form, are aimed at resolving a number of issues that were slowing cleanup of the bases in California. A DOD source says, however, it is important to think of the ideas and agreements set forth for the California bases as "models for the nation" and not just specific to the state. "The idea is to export them to other parts of the country." Breaking through the study phase at the bases and deciding on new measures of merit will aid in speeding cleanup at the bases, the source says. A source with Cal/EPA says the agreements are being reviewed by the agencies and should be made final soon.

The agreements are aimed at quick settlement of cleanup, related issues between agencies when disputes arise, creation of a workgroup that which will outline all applicable regulations a base must follow to reach cleanup, and DOD's commitment to streamline the contracting process for investigative and cleanup work. The agreements, reached June 22-26, are the result of several meetings over the last six months of the California Base Closure Committee which consists of DOD, Cal/EPA and U.S. EPA officials. The committee was created last year through an executive order by California Governor Pete Wilson (R).

Key among the issues the parties agreed on was a plan to develop a set of written criteria and procedures for transferring uncontaminated parcels of closing bases to free up the clean portions and transfer them back to the community more quickly. Congress, EPA and DOD are currently grappling with the question of transferring clean parcels of land at closing military bases. The concern is that as the bases close communities faced with an economic loss will need the land for redevelopment purposes. If the land cannot be quickly transferred back to the community, the situation will pose further economic hardship.

Currently, under section 120(h) of Superfund law, property cannot be transferred until all necessary remedial action has been completed at a site. Legislators worry that because the law does not address the transfer of clean parcels of land on a contaminated site, anyone dissatisfied with a redevelopment proposal could halt plans by filing suit charging a Superfund violation.

In addition to developing procedures for transferring clean parcels, DOD has agreed to construct a similar set of strict procedures for early leasing of uncontaminated and slightly contaminated parcels where the intended reuse of the base does not require full remediation. The issue of transferring slightly contaminated parcels of land has raised the concern of some at EPA and DOD who fear that this may cause EPA to relax its worst-first policy by diverting resources from the most contaminated areas on the base to areas that are only partially contaminated and may be less of a priority.

Also included in the agreements was a commitment by EPA to develop listing procedures to ensure that uncontaminated portions of military bases are not listed on the national priorities list, and an agreement to accelerate reviews of base-specific environmental assessments by all agencies to reduce the transition period between military and civilian use of a closing base. Cal/EPA will also develop an environmental technology clearinghouse under the agreements, in conjunction with McClellan Air Force Base's current program to allow agencies and bases to more effectively share information.

The agreements also call for the creation of a community outreach program to maximize local involvement in base cleanup and reuse issues.

Following repeated warnings

CAL/EPA ISSUES ENDANGERMENT ORDER WHILE DOD RECHANNELS MONEY

After repeated warnings to the U.S. Air Force to resume cleanup work at Castle Air Force Base, California EPA officials July 16 issued an imminent and substantial endangerment order to the base to prevent contaminated groundwater from reaching private and municipal wells and to resume efforts to address contamination.

At the same time a letter from an Air Force official to Cal/EPA says the department has reallocated $122,000 that will aid in the completion of the site investigation work.

This move comes as EPA and California are engaged in a dispute resolution with the Department of Defense over EPA's move to fine the Air Force for failing to meet provisions in the cleanup agreement at the site. The dispute centers on whether the department has done everything possible to allocate funds for the cleanup of Round II closing bases.

The account was shorted in last year's budget process and EPA is questioning the department's efforts to find that money. If a congressional supplemental appropriations bill is not passed or DOD continues to refuse to transfer emergency funds, critical interim remedies at Castle and other closing military bases could be halted at any time in the next few weeks, EPA and state sources contend. The House Appropriations Committee July 22 agreed to revive the base closure account for Round II closing bases, allocating $167.2-million for cleanup of the bases and transferring $69-million from DOD's Environmental Restoration Account (*See related story*).

The order was issued by Cal/EPA's Department of Toxic Substances Control (DTSC) and requires the Air Force to comply with a July 1989 federal facilities agreement signed by EPA, the Air Force and the state of California.

A July 16 letter from Deputy Assistant Secretary of the Air Force Gary Vest to Cal/EPA indicates that the Air Force has allocated $122,000 necessary to complete two delayed work plans—the base-wide remedial investigation/feasibility study and the draft final workplan for the RI/FS on operable unit three. According to Vest's letter, "the stop gap measure by no means funds the entire restoration program at Castle" and implementing the overall RI/FS workplan once it is completed will require an additional $1.5-million.

The letter further says the rechanneling of funds in no way alters the Air Force's position taken throughout the dispute resolution process, rather it is a result of two recent developments in both the implementation and budgeting components of the Installation Restoration Program.

An Air Force official says the letter was sent before the state agency issued the order and the Air Force has since sent a response back to the agency questioning the move. "We thought we had an understanding and that the agency realized that the Department of Defense just did not have the money," he says.

"The Air Force has not kept its part of the agreement," said DTSC Director William Soo Hoo in a press statement. "By failing to submit required documents regarding the contamination, and halting efforts to investigate and remediate the groundwater contamination, nearby private and municipal drinking wells are now threatened by the migrating plumes." While the state appreciates DOD's efforts, this is only "a small portion of the required work at the site," says an EPA source.

Costs for two cleanups estimated to exceed $200-million

CLEANUP AGREEMENTS MOVING FORWARD AT DOE FACILITIES

Cleanups estimated to cost more than $200-million are moving forward at two Superfund sites at the Lawrence Livermore National Laboratory (LLNL). The Department of Energy will pay for cleanups at both sites.

A federal facilities agreement, which estimates a cleanup cost of $96-million, was signed June 29 for LLNL "site 300." At the lab's other site, a record of decision (ROD) has been signed by DOE, and is expected to be signed by EPA this week. The cleanup for the second site is estimated to cost $105-million and take 53 years, according to an LLNL source.

A full scale cleanup plan for "site 300," which was finalized for the national priorities list (NPL) in 1990, is expected to begin in 1996, according to a DOE source. The site has both soil and groundwater contamination from volatile organic compounds, high explosive compounds and tritium, the source says.

The proposed remedy for the other site, placed on the NPL in 1987, has resulted in the agency's receipt of more than 200 public comments, an LLNL source says. Contamination on that site stems from the use of degreasers at a former Naval air station in the 1940s and '50s, according to LLNL.

RULE BY RULE PROGRESS REPORT

Status reports indicate update since last issue

The Superfund Amendments & Reauthorization Act of 1986 requires EPA, the Interior Dept., the Occupational Safety and Health Administration and the Transportation Dept. to promulgate a series of regulations to implement the law. Superfund Report, in every issue, provides a capsule status report on the major rules. Status descriptions in bold indicate new activity since the last issue.

DESIGNATING HAZARDOUS SUBSTANCES - Proposed rule will designate extremely hazardous substances, as defined in SARA section 302 and published in the Federal Register (54 FR 3388). **Contact:** Barbara Hostage (202-260-2198)
Status: Proposed rule approved by OMB. EPA public comment period closed March 23, 1989. OMB has returned the rule to EPA for reconsideration charging that the rule created an unnecessary burden on industry. All further action is on hold for President Bush's moratorium on rule-making. EPA officials have not decided how they will respond to the OMB criticism following the temporary hold.

CONTRACTOR INDEMNIFICATION - Guidelines would set standards on indemnification of response action contractors from Superfund liability, under SARA section 119.
Contact: Benjamin Hamm (202) 260-9804
Status: After a final review by Administrator Reilly to check for the guidelines' potential drag on the pace of cleanups, the agency has released the guidelines to the Office of Management & Budget for review.

OFF-SITE RESPONSE ACTIONS - Rule interprets and codifies procedures that must be followed when a response action under CERCLA involves off-site transfer of CERCLA waste under SARA section 121 (d)(3). **Contact:** Ken Gigliello (202-260-9320)
Status: OMB returned the rule to EPA unsigned, and the rule is now on hold, although an agency source said EPA is weighing whether to try again to issue the rule.

REPORTING EXEMPTIONS - The rule, first proposed May 1983 (48 FR 23552), interprets types of hazardous substance releases exempt from CERCLA section 101(10), which defines "federally permitted" releases. **Contact:** Hubert Watters (202-260-2463)
Status: Proposed rule published July 19, 1988 (53 FR 27268). Public comment closed Oct. 19, 1988. Deadline for rule has been extended.

RESPONSE COSTS & CLAIMS - SARA sections 111(a) and (o) and 112, respectively, authorize payment of claims and require EPA to make public the limitations on claims payments for response costs and issue regulations for filing claims against Superfund sites. **Contact:** Bill Ross or Denise Ergener (703-308-8339)
Status: Proposed rule was published in Federal Register Sept, 13, 1989. Comment period closed Nov. 13. **OMB approved the rule mid-June and the measure is expected to be published in the *Federal Register* in August.**

RESOURCE DAMAGES - Dept. of Interior damage assessment regulations for natural resource damage claims under CERCLA 107 and 301 will be revised to conform with a court ruling remanding the rules for revision. **Contact:** Dave Rosenberger (202-208-3301)
Status: Proposed rule for type B regulations published in Federal Register April 29, 1991. Public comment period ended July 17, 1991. DOI is reviewing comments and is unsure when it will reissue the rule. **The Dept is also weighing whether to reopen public comment on how to assign value to resources not currently being used by human beings.**

COST RECOVERY - Rule under development to promote standardization of EPA cost recovery procedures under CERCLA 107 (a). Regulation recommended by Management Review. **Contact:** Frank Biros (703-308-8635)
Status: Rule was sent to OMB March 8 and was withdrawn by EPA for further review Aug. 23, 1991. EPA resubmitted the rule to OMB, Nov. 25, and the rule is "tied up" in the regulatory moratorium according to an agency official.

LENDER LIABILITY - EPA rule clarifyies when secured lenders may be held liable for Superfund cleanup costs. **Contact:** John Fogerty (202-260-8865)
Status: Proposed rule released by EPA on June 5, 1991. Rule published in the Federal Register June 24, 1991, Vol. 56, no. 121, p. 28798. Public comment period ended July 24, 1991. **EPA released the rule April 24, and the final rule was published in the *Federal Register* April 29. The deadline to challenge the rule is July 28.**

CONFLICT OF INTEREST - Agency-wide rule would set out new requirements for contractors for reporting potential conflicts of interest. **Contact:** Ann Carey (202-260-9962)
Status: Proposed rule first published in the Federal Register, April 26 1990 and returned by OMB in June 1990. **Agency released revised rule to OMB, Nov. 26, 1991, and OMB is still reviewing the regulation.**

TECHNICAL ASSISTANCE GRANTS - Rule would set out regulations for citizens groups applying for technical assistance grants of up to $50,000 at NPL sites. **Contact:** Melissa Shapiro (703-308-8340)
Status: Proposed interim final rule published in the Federal Register, March 24, 1988. Revised interim final rule proposed Dec. 1, 1989. **The final rule was cleared by OMB on June 18 and now awaits EPA approval.**

Policy

Central tendency exposure focus of interim guidance

SUPERFUND OFFICE STRUGGLES TO ISSUE INTERIM GUIDANCE ON RISK

In an effort to implement an agency-wide memo on risk assessment issued in February by EPA Deputy Administrator Hank Habicht, the Superfund office is grappling with several issues such as central tendency exposure levels in developing interim guidance for all EPA regions.

The Superfund office is currently in the early stages of developing exposure parameters and values and defining central tendency parameters, according to an agency scientist. This guidance is expected to be completed by the end of fiscal year 1992, she says. Currently, Superfund risk assessments do not include an estimate of central tendency, or the risks posed to the average person.

The February agency-wide memo urges risk assessors not only to estimate exposure for the "population at the high end of the exposure range but also for central tendency," the scientist says. "What it comes down to really is increasing consistency agency-wide," an EPA source says. "It would be crazy for us to go off on our own" and develop guidance totally separate from other program offices," he says. The source says for that reason, officials are considering whether—rather than developing a Superfund implementation plan for the Habicht memo—to go back and work with the entire agency to develop a plan. "We are struggling with certain issues and how to meet the spirit of this memo," he says. "This is a very important issue for us."

According to a May 26 memo, which broadly outlines the Superfund office's plans for implementing the Habicht memo, many of the risk assessments under Superfund "already address most of the points raised in the risk characterization guidance. Implementation of current policy with minor supplementation should bring Superfund risk management fully in line with recommendations in the risk characterization guidance."

The memo outlines four steps needed to implement into the Superfund program the recommendations in the risk guidance. For records of decision (RODs) to be signed in FY93, the risk guidance should be considered in developing and drafting risk management decisions, the memo says. "This may require some additional limited risk assessment work, particularly to provide an estimate of central tendency exposure." No action needs to be taken on records of decision already signed or the risk assessments supporting them, the memo says.

For risk assessments completed or close to completion in support of FY92 RODs, the memo advises that a risk assessment at a site for which the proposed plan has been developed generally would not require revisions to reflect the risk characterization guidance. However, risk assessments in draft or under development should incorporate the guidance, the memo says.

The memo also suggests that guidance on central risk tendency exposure assessments be developed. A group of headquarters and regional assessors will work to provide guidance and further recommendations on addressing population risk, the memo says. Current risk assessments typically do not include an estimate of population risk, according to the memo. In order to be "fully in line" with the risk guidance, "the Superfund program should develop additional guidance on estimating central tendency exposures and on addressing population risk, recognizing, however, that due to the lack of sufficient exposure data at most Superfund sites, it generally is not possible to estimate population risks."

Regarding risk management, the memo says that the agency will continue to use the reasonable maximum exposure scenario, set out in the National Contingency Plan, in evaluating what is necessary to achieve protection against risk to human health.

Contract Labs

Cleanup decisions unaffected by lab's practice, agency says

EPA CONTRACT LAB RECEIVES MAXIMUM FINE FOR FRAUD

An analytical laboratory that pleaded guilty to charges of fraud after contracting with EPA to analyze samples taken from Superfund sites was ordered June 7 to pay almost $1-million in fines and restitution. The lab is one of six under contract with EPA that have been convicted or pleaded guilty to fraud charges, an EPA source says.

A U.S. District Court for the Middle District of North Carolina ordered Analytical Services Corp., the former owner of the contract lab, to pay $490,000 in restitution in addition to the maximum allowable fine of $500,000, according to the Department of Justice. Analytical Services Corp., charged with "one count of presenting a false, fictitious, and fraudulent claim," was suspended from EPA's contract lab program. The lab is now shut down, a DOJ source says.

The Analytical Services Corp. lab was accused of backdating samples that EPA had sent for analysis, according to the Justice department. EPA required the samples to be tested within 10 days of their receipt. The samples were not analyzed within the time frame and EPA was not notified, DOJ says. Lab personnel backdated data through a process called "time traveling," where the time and date in which data enters a computer file is reset to an earlier, false reading, according to the press release. The lab knowingly backdated the data and requested payment for their lab work, DOJ says.

About 200 labs have participated in the EPA Contract Lab Program since its inception in 1980 and currently about 100 labs are enrolled in the program. An EPA source maintains that the six labs' fraudulent practices will not affect cleanup decisions at sites where the samples were taken for three reasons: EPA sends similar samples from a site to different labs for testing; the defective data may not relate to what needs to be cleaned up at the site; or the sampling may have been taken from a non-critical point at the site.

An EPA source says that usually an indictment of a lab brings a suspension by EPA from future government contracting. If a lab is convicted, it is "liable to be debarred" from government contracting, the source says. Suspended labs wanting to be reinstated into the contract lab program must first be audited and rechecked before a suspension can be lifted, the source says.

The fraud cases against the six labs focus on the time period from 1986-89, an EPA source says. Discovery of fraudulent practices by labs has come from lab employees or through EPA's auditing process, which may include on-site audits or magnetic tape audits, the source says.

In the spring, EPA issued a proposed rule that established procedures for the agency to follow when confronting Superfund contract laboratories under investigation for fraud. Allegations charging a lab with fraud must be reported to EPA's Office of Inspector General immediately, according to the rule (see *Superfund Report*, June 3, 1992, p. 6).

Litigation

U.S. SUES SEVEN COMPANIES FOR $29-MILLION IN CLEANUP COSTS AT NJ SITE

The U.S. has sued seven companies for the cleanup of a New Jersey Superfund site, where industry attorneys charge the vast majority of the waste can be traced to the government. The U.S. alleges in its suit that the companies are jointly and severally liable to the government for all response costs EPA has incurred at the site.

The move comes three months after a group of corporations, including four of the companies named in the U.S. suit, sued the government, alleging that the Department of Defense is liable for the majority of waste at the site. The companies are seeking to recover over $1-million they paid to New Jersey pursuant to a state directive. The U.S. sent approximately 70 million gallons of waste to the site, compared with 10 million gallons from all the industrial companies combined, one industry attorney alleges.

"We think it is terribly irresponsible for the government to use the joint and several liability tool" to shift costs caused by DOD pollution onto private companies, another industry attorney says of the U.S.'s suit.

The cases center on the Bridgeport Rental and Oil Services (BROS) site in Gloucester County, NJ, which is ranked 35th on the list of the nation's more than 1,200 worst hazardous waste sites.

In its June complaint, the U.S. claims it has incurred approximately $29-million in response costs at the site, and

that the companies—either as owner/operators or arrangers for disposal of waste at the site—are liable for that amount plus interest. The Department of Justice filed a complaint on behalf of EPA in the U.S. District Court for the District of New Jersey.

The industrial companies, in their March 20 suit, allege that the site was "extensively utilized by the United States' military installations to dispose of tens of millions of gallons" of contaminated waste. During the period from 1960 to 1980, "the single largest contributor of waste" to the site was the U.S. through several DOD facilities, including the Dover Air Force Base in New Hampshire and the Philadelphia Naval Shipyard in Pennsylvania, the companies argue.

An EPA attorney calls the companies' suit an unusual move, in that the group said they incurred costs by complying with a state directive and proceeded to bring an action against the government. He says ordinarily companies would wait for a cost recovery suit by EPA then file a counterclaim. Their purpose in bringing the suit was apparently to gain a tactical advantage, he says. "It allows them to portray DOD as the responsible party." The extent of the government's responsibility at the site is not yet clear, according to the attorney.

In addition to the conflict over the government's contribution to the waste at BROS, the U.S.'s suit is riddled with problems, according to an industry attorney. He says because four of the seven companies sued the U.S. last year, the government's only recourse is to file a counterclaim; the U.S. does not have the option of filing a fresh suit against the companies, he says. The EPA attorney says, however, that the U.S. could have chosen to file either a counterclaim or a new suit. The industry attorney further cites an executive order requiring that DOJ seek to settle claims before filing suit. "They did not do this in this case." On the contrary, the EPA attorney says, the agency conducted settlement negotiations with a number of companies including some of the industry defendants, and offered them an opportunity to perform cleanup at the site. "They forced us to file a cost recovery action," he says.

The U.S. sued Allied-Signal, Inc., Atlantic City Electric Co., E.I. duPont de Nemours and Co., International Flavors and Fragrances, Inc., Monsanto Co., Rohm and Haas Co., and Rollins Environmental Services, Inc. Allied, DuPont, Monsanto, and Rollins were parties to the March suit against the government.

Both cases are now pending before a federal district court judge in New Jersey.

The BROS site comprises approximately 30-acres of land on Cedar Swamp in Gloucester County, NJ. The site is named for its current owner, Bridgeport Rental and Oil Services, Inc. It was used at various times as a waste oil reprocessing, waste disposal, and waste storage facility from about 1960 to 1980.

Company seeks discharge from statutes other than CERCLA

BANKRUPT COMPANY SEEKS JUDICIAL REVIEW OF SUPERFUND LIABILITY

A bankrupt company seeking to resolve its liability at four Superfund sites has filed suit against the U.S. in a federal district court in New York asking that it be discharged from environmental claims under Superfund law as well as under other statutes.

Despite an agreement by the U.S. that would bar it from bringing Superfund injunctive claims against the company and that would release the company from liability, the company charges that the government has not agreed to releasing the company from liability under statutes other than the Comprehensive Environmental Response, Compensation & Liability Act (CERCLA).

One attorney familiar with the case says that the company, Manville Corp., was correct in seeking relief from the court in order to ensure that the company is discharged from all environmental claims. "This is something the government does not dispute." But the attorney says the government is baffled by the fact that Manville has not agreed to what the U.S. has offered. "What more they could possibly want, I have no idea," he says.

The case revolves around the Manville Corp. which filed for bankruptcy in 1982. The action was precipitated in part by massive liability Manville was facing for personal injury claims arising from asbestos exposure and asbestos-related property damage claims. The court confirmed the company's bankruptcy in 1986, but since that time Manville received letters and information requests from EPA pertaining to four Superfund sites—Coalinga Asbestos Mill, Lowry Landfill, Union Chemical, and Yellow Water Road.

According to Manville's memorandum filed with a federal district court in New York, although the U.S. has admitted that the company's bankruptcy discharges it from any monetary claims relating to pre-confirmation releases or threatened releases of hazardous substances at the four sites, the U.S.'s contention that its proposed judgment would "give Manville all of the relief it could possibly obtain through a trial is wrong."

Manville says it seeks a judgment that "all environmental claims under CERCLA as well as any other statutes have been discharged." The memo further says that the government's offer fails to protect it from possible contribution claims.

A reply memorandum by the U.S. filed last week, argues that the settlement offer gives Manville "the full relief to which it is entitled" on all claims it has pleaded in its complaints with respect to the four specific Superfund sites. The government says Manville's suit makes it clear that the company's "real purpose here is not to win the case it has brought, but to use it as a vehicle for attempting to litigate some abstract issues it believes may control some other—and at this point purely hypothetical—case . . . ."

The memo further says that it is Manville and not the government which seeks to delay the case and that "Manville's attempts to create genuine issues of material fact—or novel

theories of law—fail at every turn."

A hearing in the case is scheduled for August 12, according to an attorney close to the case. (*Manville Corp. v. U.S.* No. 91 Civ. 6683, U.S. District Court for the Southern District of New York, July 2, 1992 [Manville's memorandum], July 22, 1992 [U.S. response to memo]).

Federal court rules

COMPANY NOT COVERED FOR CLEANUP COSTS EXPECTED TO EXCEED $750-MILLION

A company potentially facing over $750-million in environmental cleanup costs cannot recover the money from its insurers, a federal court ruled July 10, in part finding that contamination from the company's disposal of waste over a period of several years is exempted from coverage under the policies' pollution exclusions.

The U.S. District Court for the Eastern District of Pennsylvania denied coverage primarily on the grounds that the company failed to provide timely notice of claims. In a 183-page opinion, the court also laid out its reason for denying summary judgment for the company on the pollution exclusion question.

At issue is whether Texas Eastern Transmission Corporation may turn to its insurers for remedial and legal costs associated with cleaning up contamination from PCB discharges occurring as part of its operating a natural gas pipeline.

The court focused in part on the controversial pollution exclusion clause, which says that liability stemming from the release of contaminants is not covered unless the release is sudden and accidental. Insurers and policyholders for years have battled in the courts over the interpretation of this clause. Policyholders argue that sudden can be interpreted to mean unexpected or unintended, without any reference to the duration of the occurrence, while insurers say "sudden" in the policies means abrupt and instantaneous, thereby ruling out coverage for gradual pollution.

The courts look at two key issues in relation to the pollution exclusion: 1) is the focus of the exclusion the act of discharging the waste or the ensuing environmental damage? and 2) does "sudden" mean only "quick" or "abrupt," or can it also have a non-temporal meaning?

The 3rd Circuit in this case followed the majority of federal courts in ruling that the exclusion applies to the initial discharge of waste and not to the subsequent damage. The court, applying Texas law, predicted that the state's highest court would require that the discharge of contaminants be both sudden and accidental to allow coverage.

On the second issue, the court was not persuaded by a common policyholder argument that because "sudden" has varying dictionary definitions it is ambiguous and therefore should be construed in favor of the insured. "I agree with those courts holding that dictionary definitions are not significantly helpful in determining whether a term has two reasonable definitions.... I will therefore accord the conflicting dictionary terms little weight," the judge wrote.

The judge took into account the drafting history of the pollution exclusion, but unlike several other courts which have done so did not conclude in favor of the policyholders. The 3rd Circuit acknowledged that there is evidence that some contract drafters considered the meaning of "sudden" to be "unexpected and unintended," but concluded that because Texas Eastern and its insurers apparently did not discuss the meaning of "sudden" or the original intent of the drafters when they entered into their contracts, the drafting history is not persuasive evidence that sudden can be interpreted without a temporal restriction.

The court concluded that the Texas Supreme Court would decide that the term sudden "is unambiguous and cannot reasonably be divorced from 'swiftness,' 'quickness,' or all temporal significance."

The court also discussed at length the interpretation of "damages" in the comprehensive general liability policies—another pivotal issue in liability insurance cases. The court concluded that government-mandated cleanup costs can in fact be considered damages, contrary to insurers' argument that the costs of complying with EPA and state consent decrees are not recoverable. "Because Texas law requires that insurance terms be given their plain, ordinary meaning from the standpoint of the insured, these costs, although incurred as a result of an injunctive order, should be recoverable," the court said.

Since the court ruled in insurers' favor on other issues, the damages point is moot, but the court's interpretation here would be significant if the case were to be appealed and go to trial on this issue, an attorney close to the case says.

The court cited rulings in the 4th and 8th Circuits which held that while "damages" may be ambiguous in the view of the lay person, it is not ambiguous in the context of insurance contracts and should be narrowly defined to exclude costs of complying with government orders. EPA has the power to require parties to incur huge costs to remediate environmental damage, the court said, stating: "This power blurs the line between what might traditionally be considered damages (a remedy at law) and injunctive relief (a remedy in equity)."

Texas Eastern Transmission Corporation owned and operated a natural gas pipeline system extending from well fields in Texas, Louisiana, and the Gulf of Mexico to New York City. Since 1970, turbine-driven compressors at various points along the pipeline have used lubricant with PCB concentrations of 88% to 90%. The compressors were routinely started up and shut down during the course of operations. During start-up and shut-down, lubricant sometimes vented into the air and settled on the ground. And liquids accumulated in the pipelines were repeatedly discharged into earthen pits at the compressor stations.

Pursuant to the cleanup of Texas Eastern's compressor station sites, Texas Eastern entered into a consent decree with EPA in 1988. Under the agreement, the company was to clean up the property contaminated by its PCBs. Prior to this, in 1987, Texas Eastern signed a consent decree with the state of Pennsylvania, agreeing to test soil and groundwater for possible PCB contamination and to remediate any discovered contamination.

The company later agreed to pay a penalty of $5.3-million to settle other state claims that the company had violated state waste laws (*In re Texas Eastern Transmission Corporation PCB Contamination Insurance Coverage Litigation*, U.S. District Court for the Eastern District of Pennsylvania, MDL Docket No. 764, July 10, 1992).

Calling U.S. claims unnecessary and inappropriate

ALCAN FILES RESPONSE TO GOVERNMENT'S PETITION FOR REHEARING

An aluminum company fighting to prove that Superfund's liability scheme may have its flaws and in some cases may require a court to decide whether the scheme is appropriate recently told a court of appeals that the government's request for a rehearing is unnecessary, inappropriate and without merit.

Alcan Aluminum Corp., in a July 15 response to the petition for rehearing, says that the government's assertion that a federal appeals court's decision will result in a raft of aimless, unwarranted and costly evidentiary hearings is "wholly without merit."

There is little doubt that applying a standard of absolute liability under the Comprehensive Environmental Response, Compensation & Liability Act (CERCLA) is very cost effective, according to Alcan. "However the imposition of absolute liability does little to insure that the liability imposed has some reasonable relationship to the acts of the defendant." Alcan suggests that if the government believes its administrative costs in implementing CERCLA are going to be "too high because there are no practical limits on materials that might now be subject to a divisibility analysis, it should at this point heed this court's advice . . . ."

The case surrounds a May 14 decision by the U.S. Court of Appeals for the 3rd Circuit which overturned an earlier ruling by a federal district court in Pennsylvania. The 3rd Circuit found that the lower court erred in assigning sweeping liability to Alcan in holding the company liable for cleanup costs of the Susquehanna River in the amount of $473,800—the difference between the full response costs the government had incurred in cleaning the river and the amount the government had received from the settling defendants. Although the 3rd Circuit agreed with the U.S. in part, the court remanded the case to the lower court pending further investigation into the scope of Alcan's liability.

Alcan, a potentially responsible party at the Butler Tunnel Superfund site in Pittston, PA, asserts that the level of hazardous substances in its emulsion which was disposed of at the Butler site was below the naturally occurring levels and therefore could not have contributed to the contamination (See *Superfund Report*, June 3, 1992, p.17).

One of the key issues in the case is whether or not Alcan has a legitimate divisibility defense. The 3rd Circuit ruled that if Alcan can establish that the contamination is capable of being reasonably divided, then it should be held liable only for the response costs relating to that portion. In its response, Alcan says the court's conclusion that divisibility issues be resolved at the liability stage is not only consistent "it focuses directly on the abuses in the present process involving `strong arm tactics' which the government is obviously reluctant to give up."

According to Alcan, the "fundamental change in CERCLA's liability scheme under the opinion is to limit the government's unilateral ability to impose unlimited liability as it sees fit regardless of the impact, if any, of a particular generator's waste on a Superfund site." Alcan further says that, ironically, the costs which the government foresees as a result of the court's ruling was created by its "own success in persuading this court to define the universe as composed exclusively of hazardous substances. . . . The government is simply complaining about the fact that it has become a victim of its own success."

Alcan also argues that the government's suggestion to add a footnote concerning summary judgment is an attempt to deprive Alcan of a hearing. ". . . The footnote basically asks for a second free shot at summary judgment and reflects the government's unwillingness to accept the holding of this court that summary judgement was inappropriate." Alcan disputes the government's request to insert the words "threat of release," arguing that in this case there was not a threat of release but rather a release of hazardous substances and the government wrongly seeks to recover all of its response costs from Alcan. This request is inappropriate, Alcan says, because "they are not seeking costs for the threat of release, nor have they been able to demonstrate the minimal conditions for a threat of a release with respect to metals. Under such circumstances, the government's request presents the risk of further confusion and is irrelevant" (*U.S. v Alcan Aluminum Corp.*, U.S. Court of Appeals for the 3rd Circuit, No. 91-5481, July 15, 1992).

Superfund Report Litigation Quick-Look — Update of 13 Cases

LENDER LIABILITY

Fleet Factors: U.S. Appeals Court ruled that a secured lender could be liable for Superfund contamination at a borrower's facility, if the lender had the capacity to influence borrower's decisions on hazardous waste. Court ruled "It is not necessary for the secured creditor actually to involve itself in the day-to-day operations of the facility in order to be liable...." (U.S. v. Fleet Factors Corp., U.S. Court of Appeals, 11th Circuit, 89-8094)

Suggestion for rehearing was denied July 17. Attorneys for Fleet filed a petition for review by U.S. Supreme Court Sept. 21. Supreme Court denied Fleet's petition Jan. 14, sending the case back to the district court. **U.S. had requested and been granted a stay in the case to evaluate the impact of EPA's proposed rule on lender liability. The case was recently reactivated and the court has requested that motions for summary judgement be filed with the court by July 31 with replies due by Aug. 28.**

MUNICIPAL LIABILITY

Goodrich v. Murtha: A group of towns have asked federal district court to adopt EPA's policy on municipal liability as law, thereby protecting cities and towns from Superfund liability if they only contributed trash to a site. Other PRPs object, claiming the towns should share in cleanup costs. (B.F. Goodrich Co., et al., v. Harold Murtha, et al., v. Ridson Corp., et al., U.S. district court for Connecticut, N-87-52)

Towns filed for summary judgment May 31, 1990. Court denied summary judgment motion Jan. 8, 1991 ruling there is no exemption for municipal solid waste in CERCLA. Court of Appeals for the 2nd Circuit May 8 granted motion for interlocutory appeal. The towns filed their brief June 24. Appellee's brief and a friend-of-the-court brief from industry trade groups were filed July 24. Towns' filed reply August 7. The 2nd Circuit ruled March 12 that municipal trash is potentially a hazardous waste under the Superfund law, stating that despite the "burdensome consequences" of such a designation, an exemption for cities and towns would thwart the language and purpose of the statute.

The Laurel Park Coalition in response to a request from the district court has filed a brief which demostrates their third-party claims filed against 1,151 propspective parties exist in the court's records. A group of defendants, the General Waste Stream Defendants Liason Group, May 22 filed for summary judgement on the basis that there is no evidence that they sent any hazardous substances to the Beacon Heights and Laurel Park sites.

Operating Industries, Inc.: Over 64 industrial companies are suing 29 municipalities, the County of Los Angeles, and the California Dept. of Transportation to recover the costs of cleaning up the Operating Industries Landfill Superfund site in Monterey Park, CA. Transportation Leasing Company, et al. v. The State of California (CalTrans), et al., U.S. District Court, Central District of California, No. 89 73686.) **Judge William Byrne ruled from the bench July 21 that the cities "owned or possessed" trash generated by residents and local businesses within their borders and transported by private haulers to the site. Court is expected to issue a written opinion in the next several weeks. Case will go to trial to determine how much waste originated in each city and was sent to the OII site, whether the trash contained hazardous substances, and ultimately for what share of total cleanup costs cities may be held liable.**

INTERSTATE WASTE TRANSPORT

Chemical Waste Management Inc.: An Alabama law that would impose two fees on the disposal of hazardous waste at commercial waste facilities in the state is being opposed by Chemical Waste Management Inc. In May 1990 the 11th Circuit Court of Appeals held that the law, which imposed an additional $72 per ton fee on waste generated outside of Alabama, violated the U.S. commerce clause but rejected the company's challenge to a $25.60 base fee fee on all waste disposed of at facilities within the state. The Alabama State Supreme Court adopted the circuit court's opinion on the base fee, however, reversed the court's decision on the additional fee. (Chemical Waste Management Inc., v Guy Hunt, Governor of Alabama, et al. U.S. Supreme Court No. 91-471 Oct. 1991)

The U.S. Supreme Court granted CWM's petition Jan. 27 agreeing to rule on one portion if the law which allows Alabama to place a $72 differential fee on out-of-state waste. CWM filed its first brief March 10, the state replied April 8 and CWM responded to the state's reply April 15. Several amicus briefs have filed in support of CWM. **The court heard oral arguments in the case April 21 and on June 1 reversed and remanded the state supreme court's decision.**

HAZARD RANKING SYSTEM

Edison Electric: The Edison Electric Institute, a trade association representing investor-owned electric utilities, has mounted a legal challenge to EPA's revised Hazard Ranking System. The revised HRS is used to decide what sites should be placed on the Superfund list. The revised HRS was released in November of 1990. (Edison Electric Institute v. USEPA, U.S. Court of Appeals for the Dist. of Columbia, 91-1125)

EEI filed a preliminary statement of issues April 15. **Parties petitioned the court last year to defer the briefing and oral arguments schedule. Court agreed and the case has been stayed indefinitely. Parties are now trying to settle out of court.**

INSURANCE POLICIES

Montrose v. Admiral: A chemical corporation facing liability for bodily injuries and property damage at two hazardous waste sites sought declaratory judgment, arguing that its insurer was required to defend and indemnify the company. (*Montrose Chemical Corp. of California v. Admiral Insurance*

Co., Supreme Court of California, No. S026013) A trial court entered summary judgment for the insurers, and the chemical company appealed. The Court of Appeal of the State of California Second Appellate District Jan. 22, 1992 reversed the lower court ruling, finding that a company is entitled to coverage for pollution liability stemming from the disposal of hazardous waste, though the actual disposal predated the inception of the policy in question. The court rejected insurers' argument that they could limit coverage for ongoing injuries to a single policy period. **The insurance company filed a petition for review in the Supreme Court of California and review was granted May 21.**

ARRANGEMENT FOR DISPOSAL

Marvin Pesses: Sixteen scrap metal dealers say they are not liable for cleanup costs at a Pennsylvania Superfund site because their sales of scrap material constituted "arrangements for disposal" under Superfund law. The U.S. filed suit against the companies in October 1990 to recover cleanup costs. (U.S. v. Marvin Pesses, U.S. District Court for the Western District of Pennsylvania No. 90-0654, Oct. 1990)

A magistrate's report to the court found the scrap metal dealers liable for cleanup costs. **A federal court judge has approved the magistrate's findings and the scrap metal dealers have appealed that decision.**

NATURAL RESOURCES

Coeur d'Alene Tribe of Idaho: The Coeur d'Alene tribe, asserting its authority as a natural resource damage trustee under CERCLA, is suing a number of mining and smelting companies for ecological damages to beds and banks of the Lake Coeur d'Alene and adjoining rivers. (Coeur d'Alene Tribe of Idaho f. Gulf Resources & Chemical Corporation et al., U.S. District Court of Idaho, No. CIV 91-0342N HLR, July 31, 1991.) **In a March 20 amicus brief, the U.S. asked the court to dismiss the case as premature. The tribe and two parties in the case have argued against the motion to dismiss, and the tribe has asked the court for a stay in the case until EPA completes remedial action/feasibility study at the site.**

BANKRUPTCY

National Gypsum Co.: A federal district court in Washington has ruled that companies seeking protection from their creditors are not immune from Superfund liability. This decision marks a first-ever reading on the intersection and of bankruptcy law and natural resource damage claims sought under Superfund. The court ruled that federally-assigned natural resource damage trustees must make their claims for future response costs during bankruptcy proceedings or lose their chance of getting the money. (National Gypsum Co. v. Aancor Holdings, Inc. No. 3-91-1653 H, Feb. 12, U.S. District Court for the Northern District of Texas, Dallas Division.)

The district court in a June 24 decision awarded the U.S. just $182,642 of the $900,000 it claimed as costs for future natural resource damages. The court also awarded the U.S. one-third of its past damage assessment costs.

NATIONAL CONTINGENCY PLAN

State of Ohio: Two years after filing an appeal, nine states have presented the U.S. Court of Appeals for the District of Columbia with their first brief. The 199-page document spells out the states' charges that the National Contingency Plan goes against the intent of Congress by assigning the role of cost in cleanups and improperly allows cost considerations to enter into human health decisions. The states' also motioned the court to reconsider allowing memos on OMB's role in rule-making into the record. (State of Ohio et al. v. U.S. EPA and William K. Reilly, U.S. Court of Appeals for the District of Columbia, March 10, 1992 No. 90-1276 and 90-1439) **Thirteen states filed an amicus brief in support of the states' motion and brief. But the court in an April 29 order, dismissed the state motion to supplement the record, and ordered the states to file a corrected brief ommitting references to the "extra-record" material.**

CAPACITY ASSURANCE PLANS

State of New York: In an effort to curb the "mismanagement" of out-of-state waste New York in December filed suit against EPA charging that the agency has failed to carry out its mandatory duty to sanction and withhold Superfund money from states that fail to comply with their capacity assurance plans. EPA requires that each state develop a plan to assure the availability of in-state or out-of-state treatment disoposal for all hazardous wastes that are expected to be generated within the next 20 years. (State of New York v. William K. Reilly, U.S. District Court for the Northern District of New York, No. 91-CV-1418, May 4, 1991) **Two months ago EPA filed a motion to dismiss and the New York has filed a response to that motion. A New York state county and two towns have filed a motion for intervention claiming that EPA has failed to withold Superfund money from the northeastern states leaving the states free to dispose of their waste in the only licensed commercial landfill for hazardous wastes in the northeast located in Niagara county.**

State of South Carolina: In its battle to cut back on out-of-state waste entering the state, South Carolina in December 1991 charged EPA with failing to enforce legal sanctions when North Carolina fell short of its capacity assurance plan. (South Carolina v. William K. Reilly, U.S. District Court for the District of Columbia, No.91-3090) **The court May 7 dismissed the case, saying that South Carolina had not shown EPA had violated a "non-discretionary duty" and that the state failed to allege that EPA had violated Superfund by releasing fund money to non-complying states. South Carolina has asked the court for permission to amend the complaint, adding new charges against EPA.**

HAZARDOUS SUBSTANCES

Alcan Aluminum Corp.: The 3rd Circuit Court of Appeals overruling a Federal district court in Pennsylvania found in May that Alcan Aluminum Corp. could not be held liable for cleanup costs at the Butler Tunnels site in Pennsylvania and remanded the case back to the district court. "The District court must permit Alcan to attempt to prove the harm is divisible and that the damages are capable of some reasonable apportionment," the 3rd Circuit said. *(U.S. v. Alcan Aluminum Corp. et al.*, U.S. Court of Appeals for the 3rd Circuit, No. 91-5481, May 14, 1992) **The U.S. July 1 petitioned the court for a rehearing. Alcan has filed a response to that petition.**

Technology

NEW TOOL DELIVERS ARRAY OF IN SITU TREATMENTS

A new tool that can deliver to a contaminated area a variety of in situ remediation treatments has been proposed for use at a Texas Superfund site. The tool is not a new technology but its unique design allows it to perform six kinds of in situ remediation and can treat soil at depths up to 100 yards—a feat that has hindered other in situ methods, according to the system's vendor.

The system, called MecTool, operates through the use of a large auger that bores into soil, mixes it and perform treatments while preventing gases from escaping by trapping them under a large metal shroud. The shrouds vary in diameter, ranging from four to 12 feet. Contaminated gases can then be piped outside of the shroud for treatment, according to the vendor, Millgard Environmental Corporation of Livonia, MI. Patents on the tool were granted in June, a Millgard source says.

According to another Millgard source, MecTool can deliver "just about" any type of in situ treatment to soil and sludge, but it is primarily designed for soil vapor extraction and solidification. Millgard says it may also be used for stabilization, bioremediation, soil washing and creating containment walls.

The delivery system is not a landmark breakthrough, a source with the Department of Energy's Oak Ridge National Laboratory (ORNL) says, but he adds that it has a unique feature--"depending on the contamination, you can modify the reagent system fairly easily." According to Millgard, the system can inject grouts, liquids, steam and gases directly into the soil. MecTool's method of vapor extraction differs from the conventional method in that it digs into the ground and mixes soil while pushing heated air or steam through the soil. Through this, it extracts vapors, which are then treated, according to the ORNL source. The conventional method extracts vapors from undisturbed soil "and takes a long time," he says. More money and energy is needed for MecTool to conduct vapor extraction quickly, but it may cost less in the long run, he says.

Currently, the cleanup contractor at the Bailey Waste Disposal Superfund site in Bridge City, TX, Chemical Waste Management Remedial Services Group Inc., plans to use the device for part of the site's cleanup. An EPA source says the tool could be approved for use at the site as long as it meets the criterion of stabilizing the soil.

A source with Chemical Waste says the cost of using MecTool at the Bailey site is less than other possible treatments because it handles contaminants in situ and requires less manpower. The source would not disclose the projected cost of using MecTool at the site.

MecTool was also included in pilot tests at another Superfund site and a Resource Conservation & Recovery Act site earlier this year.

A source with the Ohio Environmental Protection Agency says "everything looked favorable" in a report on the pilot test that used MecTool at a RCRA site in Ohio. At the site, the technology was evaluated for hot-air extraction, chemical oxidation and solidification. "Every indication I got was that it works quite well," says the source, adding, "It was an interesting piece of equipment and did a pretty decent job."

The Ohio EPA source conceded the technology is not a new concept, but he believes "it has many applications because it is able to inject material into the soil."

In a pilot test at the Tysons Dump Superfund site in Montgomery County, PA an EPA source says MecTool was also used to conduct soil vapor extraction. The system was effective in elevating recovery rates during vacuum extraction, but those rates fell once the auger's mixing halted, the source says. A report is being prepared on the tool's performance during the pilot study, according to a source with Ciba-Geigy Corporation, a potentially responsible party at the site. The report is analyzing the effect of the tool's mixing of soil during vapor extraction and whether that effect will be sustained over a long time, the PRP source says.

SUPERFUND MANDATED

CHEMICAL PROFILES

Latest Releases — Updates to Group I chemicals

The Agency for Toxic Substances & Disease Registry has begun the daunting task of updating the toxicological profiles of the most common Superfund pollutants. Nineteen of the 25 "Group I" profiles first issued in the spring of 1989 have been re-released to include new scientific findings on specific site contaminants. To get copies of the new releases, or to receive the original drafts or final profiles for the full list of "Group I" pollutants, call our hotline at 800-424-9068 (or in the Washington, DC area 703-892-8507).

8500U-Aldrin
8501U-Arsenic
8505U-Benzene
8506U-Beryllium
8508U-Cadmium
8509U-Chloroform
8510U-Chromium
8512U-Cyanide
8514U-1,4 Dichlorobenzene
8507U-Di (2-ethylhexyl)phthalate
8515U-Heptachlor
8516U-Lead
8517U-Methylene Chloride
8518U-Nickel
8519U-N-Nitrosodiphenylamine
8520U-PCBs
8522U-Tetrachloroethylene
8523U-Trichloroethylene
8524U-Vinyl Chloride

Group IV chemicals (draft reports)

Draft toxicological profiles have been released for all 30 "Group IV" chemicals listed below. This fourth group of government-prepared reports for the first time provides you with detailed information on the substance, its use and the environmental risks associated with it.

8605- Aluminum
8606- Barium
8607- Boron
8608- 1,3-Butadiene
8609- Carbon disulfide
8610- Cresols
8611- 1,2-Dibromoethane
8612- 1,3-Dichloropropene
8613- Fluorides
8614- Manganese
8615- Methyl Parathion
8616- Nitrophenol
8617- Styrene
8618- Tin
8619- Vanadium
8620- Antimony
8621- 2,3 Benzofuran
8622- Bromomethane
8623- 2-Butanone
8624- Cobalt
8625- Dibromochloropropane
8626- 2,4-Dichlorophenol
8627- Endosulfan
8628- 2-Hexanone
8629- Methyl mercaptan
8630- Mustard gas
8631- Pyridine
8632- Thallium
8633- 1,2,3-Trichloropropane
8634- Vinyl acetate

These critical reports — required by Superfund and available through Inside EPA's Environmental Document Service — will shape the scope and cost of Superfund cleanups nationwide. The toxicological profiles detail the health hazards posed by major chemicals found at Superfund sites — for the first time providing a common chemical data bank upon which regulators and the business community can both rely.

Prepared by the Agency for Toxic Substances & Disease Registry, the data contained in these profiles will arm federal and state regulators with key chemical information needed to craft final cleanup requirements.

To order these toxicological profiles, or for more information on the reports themselves, call toll-free 800-424-9068 (in the Washington, DC area, call 703-892-8507).

Individual reports are available @$26.50, while complete sets of Group I, II, III or IV chemicals (binders included) are available @$500.00 — per set.